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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,
Petitioners,

v.

AGNES MARY MANSOUR, Director, Michigan Department of Social Services,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In an action under 42 USC § 1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

LIST OF PARTIES

All parties are listed in the case caption. Named plaintiff Gail Blessing was dismissed as to some claims and intervening plaintiff Johnny Green was added in the District Court. Counsel have lost contact with named plaintiffs Michael and Linda Kelley, Amelia Van Burger, Mary Jones, and John Kiever, but they remain members of the proposed class. Defendant John T. Dempsey's successor in office as Director of the Michigan Department of Social Services is Agnes Mary Mansour.

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OPINIONS BELOW

The opinion of the Court of Appeals appears at 742 F.2d 277 (6th Cir. 1984). J.A. at 156. The opinions of the District Court for the Eastern District of Michigan are not published; copies are included in the Joint Appendix at 36 and 141.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 22, 1984. A timely petition for rehearing *en banc* was denied on October 18, 1984, and a petition for certiorari was filed within ninety days of that date. Jurisdiction in the District Court was based on 28 USC 1331 and 1343(3), and this Court's jurisdiction is invoked under 28 USC Section 1254(i).

APPLICABLE PROVISIONS OF LAW

1. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State; or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

The present case of *Green* v. *Mansour* is comprised of two cases, *Michigan Welfare Rights Organization* v. *Dempsey* and *Banas* v. *Dempsey*, which were jointly appealed to the Sixth Circuit Court of Appeals. Because the facts of each are different, they are described below separately.

A. The Child Care Case (*MWRO* v. *Dempsey*)

Plaintiffs/Petitioners filed a class action complaint on April 11, 1980, seeking relief under 42 USC Section 1983

and challenging certain regulations of defendant/respondent, the Director of the Michigan Department of Social Services (MDSS), that denied a work expense deduction for child care expenses incurred by employed Aid to Families with Dependent Children (AFDC) recipients who needed such child care to enable them to keep their jobs.

Plaintiffs alleged that by wrongfully refusing to deduct these child care costs, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. Plaintiffs further asserted that, in failing to inform them of their right to claim child care expenses and of their right to request an administrative hearing to challenge the resulting denial of benefits, defendant was violating not only federal regulations but also the due process and equal protection clauses of the Fourteenth Amendment. J.A. at 11-14.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income the full amount of any expenses reasonably attributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant's refusal to permit child care costs actually incurred to be considered as an allowable expense of employment in calculating budgetable earned income violated *Shea* v. *Vialpando*, 416 US 251 (1974).

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notice relief to advise all class members who lost benefits in the past of their right to an administrative review under state procedures, and attorney's fees. J.A. at 13, 14.

Effective October 1, 1981, and before plaintiffs could move for summary judgment, Congress amended the relevant portion of the Social Security Act, 42 USC § 602(a). The amendment confirmed the earlier requirement that the state agency disregard (from earned income) expenditures for child care costs required to be incurred for care of a dependent child, but imposed a maximum dollar limit on that deduction. See Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, 95 Stat. 357-933 (1981), presently codified in 42 USC § 602(a)(8)(A)(iii). Defendant thereupon changed state regulations to permit child care deductions but limited the amount that could be claimed. These changes in state law were also effective October 1, 1981, and were consistent with the amended provisions of federal law.

After the federal statutory change, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. Plaintiffs sought an order requiring the defendant state official to issue a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 US 332 (1979). Defendant moved to dismiss, arguing that the federal law change had rendered moot any claims of violations of pre-October 1, 1981, federal law and that the Eleventh Amendment barred any relief, including an order requiring issuance of a *Quern*-type notice, on behalf of persons who had lost benefits as a result of defendant's past actions.

On June 22, 1982, the District Court granted the motion to dismiss on the grounds urged by the defendant and denied plaintiff's motions for summary judgment and class certification. See appendix to Petition for Certiorari. The Sixth Circuit affirmed, holding that the case was not moot, but that the Eleventh Amendment barred

the requested relief. See 742 F.2d 277 (6th Cir. 1984). J.A. at 36.

B. The Stepparent Case (*Banas* v. *Dempsey*)

On May 11, 1981, nine named plaintiffs filed a class action complaint, seeking relief under 42 USC Section 1983, and challenging policies of the defendant Director of the MDSS which required that income of stepparents be considered in determining AFDC eligibility or grant levels for indigent stepchildren otherwise eligible for AFDC who lived in the same household as the stepparent. Plaintiffs claimed that the defendant's policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto. The applicable regulations prohibited states from assuming stepparent income or resources to be available to stepchildren unless there existed, under a state law of general applicability, a legal obligation on the stepparent to support stepchildren that was coextensive with the obligation of support imposed on natural and adoptive parents. See 45 CFR § 233.90(a)(1) (1981) and *King* v. *Smith*, 392 US 309 (1968) and *Lewis* v. *Martin*, 397 US 552 (1970).

Plaintiffs alleged an equal protection violation as a result of a section of the Michigan Poor Law that required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits. Plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiffs' rights of family privacy and free association by encouraging stepparents to move out of the home or to get a divorce if they were already married and by discouraging prospective stepparents to marry.

Plaintiffs also contended that while defendant's regulations generally permitted dependent children and their

caretaker relatives to deduct from gross earned income all actual expenses of producing that income, they required that eighty percent of the gross earnings of a stepparent be automatically counted as available income without allowing for any work expense deductions. Plaintiffs asserted that this disparate treatment of the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notice relief to advise all class members who had lost benefits in the past of their right to administrative review under state procedures, and attorney's fees. J.A. at 64.

Preliminary injunctive relief was granted by the district court and the defendant appealed the order. On May 28, 1981, and before the appeal of the preliminary injunction could be heard, Congress amended the relevant portion of the Social Security Act, 42 USC § 602(a), effective October 1, 1981, to require that income of stepparents living in the same household as a stepchild which exceeds a specified amount be counted for the purposes of determining eligibility and amount of benefits for AFDC. See Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, 95 Stat. 357-933, presently codified at 42 USC § 602(a)(31). Defendant changed Michigan's stepparent regulation, also effective October 1, 1981, to bring it into compliance with the new federal law. As a result of these changes in state and federal law, the District Court amended the preliminary injunction by stipulation, limiting its prospective effect to the period before October 1, 1981, and the defendant voluntarily dismissed his appeal.

Plaintiffs then filed a motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 US 332, (1979). Defendant filed a motion to dismiss the action, arguing that plaintiffs' claims were mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the relief sought by plaintiffs.

On June 22, 1982, the District Court issued its memorandum Opinion and Order granting defendant's motion to dismiss the action and denying plaintiffs' motions for summary judgment and class certification. See appendix to Petition for Certiorari. The Sixth Circuit affirmed, holding that the case was not moot, but that the Eleventh Amendment barred the requested relief. See 742 F.2d 277 (6th Cir. 1984), J.A. at 141.

RESTATEMENT OF QUESTION PRESENTED

In an action under 42 USC § 1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

SUMMARY OF ARGUMENT

I.

By Well Established Precedent, Declaratory And Notice Relief Are Not Barred By The Eleventh Amendment Under The Circumstances Of This Case.

A. The plaintiffs in this case are seeking exactly the same relief that was sought by the plaintiffs in the *Jordan* litigation. In *Edelman* v. *Jordan*, 415 US 651 (1974), this

Court reversed, on Eleventh Amendment grounds, the entry of an award of retroactive benefits against state welfare officials. The Court let stand, however, a declaratory judgment holding that the state officials had violated federal law in the past. In *Quern* v. *Jordan*, 440 US 332 (1979), in lieu of the voided order for retroactive benefits, this Court approved an order for notice relief which directed state officials to inform the plaintiffs who had lost benefits that their federal rights had been violated in the past, and that they might therefore be entitled to a state administrative remedy. The plaintiffs here are requesting the same declaratory and notice relief that was approved in *Edelman* and *Quern*, so that those cases should control and the relief should be granted.

B. The Eleventh Amendment forbids suits against States. However, when a state official violates federal law, he is stripped of his state authority under the doctrine of *Ex Parte Young*, 209 US 123 (1908), and is subject to suit so that federal rights may be vindicated. Under *Edelman* and *Quern*, *supra*, a federal court can, consistent with the Eleventh Amendment, (1) enter declaratory relief holding that federal law was violated, (2) grant notice relief to those affected by the past violations, and (3) issue an injunction requiring future compliance with federal law, regardless of the cost to the state. The court *cannot*, consistent with the Eleventh Amendment, make a retroactive award of money damages, because to do so implicates the state as a real party in interest, and is barred by sovereign immunity. Where, as here, no money judgment or retroactive award is sought, the simple request for notice relief does not affect the state treasury and therefore is not barred. Notice relief has no impact on the state treasury because, as *Quern* held, even if some plaintiffs eventually recover their lost benefits (after being told of the state administrative remedy), that recovery will be

the result of the actions of state agencies and state courts pursuant to state law.

Alternatively, even if notice relief has a fiscal impact on the state that might otherwise implicate the state's immunity, this Court has already ruled that such an impact is permissible when it is a necessary consequence of future compliance with federal law. In *Quern* this Court concluded that an order for notice relief directed to welfare recipients who lost benefits in the past constitutes permissible prospective relief because such an order fits the "prospective-compliance exception" set out in *Milliken* v. *Bradley*, 433 US 267 (1977) *(Milliken II)*.

Therefore, notice relief against a state officer alleged to have acted in violation of federal law does not violate the Eleventh Amendment because (a) notice relief has no cognizable impact on the state treasury, and (b) notice relief is itself permissible prospective relief as defined in this Court's Eleventh Amendment holdings.

C. The Fourth, Fifth, Ninth, and Eleventh Circuits have all approved, on authority of *Quern*, adjudications of past violations of federal law and the entry of notice relief to class members affected, despite the absence of any ongoing conflict between federal and state law. These circuits, implicitly or explicitly, have rejected the argument of the Sixth Circuit here that some ongoing injunction, aside from notice relief itself (together with the concomitant federal question determination that the defendants acted illegally), must precede an award of notice relief. In all four circuits the courts have decided the federal question relating to past violations of federal law and entered declaratory and notice relief on behalf of the plaintiffs. Only the Second Circuit has denied relief under these circumstances, and that was in a *per curiam*

opinion, without analysis, adopting the opinion of a district court.

II.

The Sixth Circuit Held That Notice Relief Was Barred For Two Reasons, Neither Of Which Can Withstand Scrutiny.

A. The court below relied on *Cory* v. *White*, 451 US 85 (1981), for the proposition that *any* injunctive action against the state is barred by the Eleventh Amendment. But *Cory* was a diversity case that involved no allegation of violations of federal law. The plaintiffs in *Cory* therefore could not invoke the doctrine of *Ex Parte Young*, which permits injunctive suits against state officials alleged to be acting contrary to federal law. If *Cory* said what the Sixth Circuit claims, *Ex Parte Young* would have been overruled.

B. The Sixth Circuit erred by concluding that notice relief is barred by the Eleventh Amendment unless it is both prospective *and* ancillary to some other permanent injunctive relief already entered. The Sixth Circuit's conclusion is wrong because since notice relief is itself prospective, and does not constitute a money judgment, it is a permissible form of relief under this Court's Eleventh Amendment holdings, and it need not be "ancillary" to any *other* prospective relief.

The Sixth Circuit's error can be traced to its misreading of one sentence in *Quern* v. *Jordan*, *supra*. The Sixth Circuit fails to note that in *Quern* this Court distinguished only between the effect of the notice drafted by the district court and the effect of the notice approved by the Seventh Circuit, and not between those courts' power to enter notice relief at all. A federal court has the authority to enter any form of relief not barred by the Eleventh

Amendment, and notice relief is appropriate under *Quern* as long as the notice imposes only "ancillary" costs that are "a necessary consequence of compliance in the future with [the] substantive federal question determination." *Milliken* v. *Bradley*, 433 US 267, 289 (1977) *(Milliken II)*. Thus, the district court's notice in *Quern* was barred because it read like a money judgment, while the Seventh Circuit's notice was approved in *Quern* because it would impose only "ancillary" costs as a consequence of future compliance with the federal question determination that state officials had violated federal law. Finally, the Sixth Circuit's conclusion that notice relief cannot be entered absent some ongoing violation of federal law is contradicted by the facts of *Quern* itself. There notice relief was entered despite the fact that the permanent injunction was moot and no ongoing violation of federal law existed.

ARGUMENT

I. BY WELL ESTABLISHED PRECEDENT, DECLARATORY AND NOTICE RELIEF ARE NOT BARRED BY THE ELEVENTH AMENDMENT UNDER THE CIRCUMSTANCES OF THIS CASE.

After this Court's decisions in *Edelman* v. *Jordan*, 415 US 651 (1974) and *Quern* v. *Jordan*, 440 US 332 (1979), a federal court adjudicating a class action suit against state officials to enforce the provisions of the Social Security Act may enter three forms of relief: (1) a declaratory judgment that the state regulation in question violated applicable federal law, (2) an injunctive order requiring state officials to send notices to all class members affected by the regulation in the past, explaining that their rights were violated and that state remedies exist if they wish to seek redress for their losses, and (3) an injunction restraining the future operation of the illegal regulation.

The present case was filed originally seeking all three forms of relief. However, changes in federal law and

changes in the state regulations have eliminated any present conflict between the two, thereby rendering moot the third category of relief—the injunction against future violations. Despite the difference between this case and one where the need for a permanent injunction would be continuing, it is plaintiffs' contention that the Eleventh Amendment does not bar the other two forms of relief—declaratory and notice relief. Specifically, plaintiffs contend that the Eleventh Amendment considerations involved in the present case are no different from those involved in *Quern* v. *Jordan*, *supra*—the case in which this Court explicitly held that notice relief does not violate the Eleventh Amendment.[1]

A. Petitioners Here Seek Exactly The Same Relief That Was Approved By This Court In The *Jordan* Litigation.

The *Jordan* litigation[2] involved allegations that state

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[1] The adjudication of illegality need not take the form of a separate formal declaratory judgment, but may be in the form of an opinion or other findings of fact and conclusions of law. See Federal Rule of Civil Procedure 52 and *Appleyard* v. *Wallace*, 754 F.2d 955, 962 (11th Cir. 1985) (no other form of relief need precede an order for notice relief "aside from the notice itself together with a concomitant determination that the defendants acted illegally"). Of course, the fact that a federal court renders *any* sort of relief on behalf of a party means that, in effect, the court has rendered a declaratory judgment in favor of that party. Cf. *Milliken* v. *Bradley*, 418 US 717, 734 (1974) (*Milliken I*) (scope of remedies awarded by federal court may not exceed the scope of the violation of federal law found by that court).

[2] A complete citation history of the *Jordan* litigation is as follows: *Jordan* v. *Weaver*, No. 71 C 70 opinion (ND Ill., Feb. 1972); judgment (ND Ill., March 1972) (Appendix to this brief at 1a, 4a); aff'd 472 F.2d 985 (7th Cir. 1973), rev'd in part, *sub nom. Edelman* v. *Jordan*, 415 US 651 (1974); *Jordan* v. *Trainor*, 405 F.Supp 802 (ND Ill, 1975) (on remand); rev'd, 551 F.2d 152 (7th Cir. 1977); rev'd, *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir. 1977) (*en banc*); aff'd *sub nom. Quern* v. *Jordan*, 440 US 332 (1979).

regulations violated federal law regarding the prompt processing of applications for Aid to the Aged, Blind and Disabled (AABD).[3] In that case, the district court in 1972 granted summary judgment and entered three forms of relief: (1) a declaration that the state AABD application processing regulations violated federal law from 1968 up to the date of judgment.[4] (2) an injunction ordering that retroactive benefits be paid to class members who lost benefits in the past as a result of the invalid state regulations,[5] and (3) an injunction against future violations of federal law.[6] Effective in 1974, Congress abolished the AABD program, thereby rendering the third category of relief moot. See *Edelman* v. *Jordan*, 415 US 651, 653 n.2 (1974) and *Quern* v. *Jordan*, 440 US 332, 348 n.20 (1979).[7]

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[3] The AABD program had the same basic structure as does the AFDC program involved in this case.

[4] *Jordan* v. *Weaver*, No. 71 C 70, judgment at 3, ¶ 2, 4 (ND Ill, March 15, 1972) and opinion *sub nom. Jordan* v. *Swank*, at 2 (ND Ill, Feb. 4, 1972), Appendix to this brief at 4a and at 1a respectively. See also *Jordan* v. *Weaver*, *472 F.2d 985, 996 (7th Cir. 1973), rev'd on other grounds sub nom. Edelman* v. *Jordan*, 415 US 651 (1974) ("The district court . . . found defendants to be noncompliant [with federal prompt processing regulations] from and after the effective date of the regulations [July 1, 1968].") and *Edelman* v. *Jordan*, 415 US at 656.

[5] *Jordan* v. *Weaver*, No. 71 C 70, judgment at 3-5, ¶ 5 (ND Ill, March 15, 1972), Appendix to this brief at 4a. See also *Edelman* v. *Jordan*, 415 US at 656.

[6] *Id* at 1-2, ¶ 1, 3. Appendix to this brief at 4a, 5a. See also *Edelman* v. *Jordan*, 415 US at 656.

[7] When "the terms of [an] injunction . . . have been fully and irrevocably carried out," that relief is moot. *University of Texas* v. *Camenisch*, 451 US 390, 398 (1981) (preliminary injunction). Since, effective January 1, 1974, there would be no AABD applications for Illinois officials to process, an order requiring them to process applications promptly would have no further prospective effect.

In *Edelman* v. *Jordan*, *supra*, the second form of relief (the retroactive benefit order) was held void by this Court as violative of the Eleventh Amendment. In compliance with the *Edelman* opinion, on remand the district court vacated the retroactive award and substituted an order for notice relief. *Jordan* v. *Trainor*, 405 F.Supp 802, 803-804, 808-809 (ND Ill. 1975). The *en banc* Seventh Circuit, reversing a prior panel decision, modified the content of the notice ordered to be sent, but otherwise approved the district court's order. *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977) *(en banc)*.[8] This Court affirmed the Seventh Circuit, holding that the modified notice relief was permissible despite the Eleventh Amendment. *Quern* v. *Jordan*, 440 US 332 (1979).

Thus the forms of relief in the *Jordan* litigation which survived both the congressional changes and this Court's action in *Edelman* and *Quern*, were (1) a declaratory judgment that a state welfare regulation violated federal law in the past, and (2) an order for notice relief to the class affected by that invalid regulation.[9] This is precisely

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[8] The *en banc* opinion deleted language from the notice forms stating that class members were entitled to a state administrative award of retroactive benefits in a specified amount. 563 F.2d at 875. The *en banc* Court of Appeals observed: "The objectionable content of the notice forms are not in keeping with the views expressed by the trial judge in his memorandum opinion to which they were attached. With those views, but not the forms, we agree." *Id.* See *infra* this brief pp. 39-40 for a more complete discussion of the difference between the district court's notice form and the modified notice held proper by the *en banc* Seventh Circuit and this Court.

[9] This Court's decision in *Edelman* did not affect the declaratory portions of the relief ordered by the district court. To the contrary the *Edelman* Court agreed with the lower courts' holdings that the federal regulations were a valid exercise of HEW's power and that they were binding on the defendant state officials. 415 US at 659 n.8.

the same relief sought by the Michigan plaintiffs below. Here, petitioners originally requested three forms of relief: (1) a declaratory judgment that state regulations on child care deductions and stepparent deeming violated federal law, (2) an injunction ordering notice relief to all class members affected by the invalid regulation in the past, and (3) a preliminary and permanent injunction against future enforcement of those regulations. See *Banas* Complaint, Relief, paragraphs (c), (d), and (e), J.A. at 13, 14, and *Green* Intervenor Complaint, Relief, paragraphs (c), (d), and (e), J.A. at 118, 119. However, just as in *Jordan*, a change in federal law mooted the petitioners' third request for relief—the request for a preliminary and permanent injunction against future enforcement of the illegal regulations. See Omnibus Budget Reconciliation Act, Pub.L.No. 97-35, 95 Stat. 357-933, effective October 1, 1981. Nonetheless, and again just as in *Jordan*, the petitioners pursued their claims for notice relief.

The importance of an order for notice relief to class members who have lost benefits in the past, both in the *Jordan* litigation and in the present case, is clear: the notice advises class members of available state remedies to which they may resort, if they choose. Primary among those state remedies is the administrative hearing pro-

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Further, in *Edelman* the Illinois officials contended in the Court of Appeals and in the Supreme Court that the declaratory portion of the district court judgment should be given prospective effect only under the rule of *Chevron Oil Co.* v. *Huson*, 404 US 97 (1971). *Id.* at 658 n.7. This argument was rejected by the Court of Appeals and this Court declined to disturb that ruling. *Id.* See also *Quern* v. *Jordan*, 440 US at 347 n.18 (rejecting Illinois officials' arguments that entry of an order for notice relief violated the rule of the case established by *Edelman* and that the district court lacked the power to order notice relief under the terms of the Court's *Edelman* remand).

cess.[10] At all times relevant to both the AABD program involved in the *Jordan* litigation and the AFDC program involved in the case at bar, federal law has required states to provide the opportunity for an administrative hearing to all applicants or recipients who are aggrieved by actions of the state agency affecting their grant. 45 CFR § 205.10(a)(5) (1973-1984). If the action at the hearing is favorable to the claimant, or if the state agency decides in the claimant's favor prior to the hearing, the agency must "make corrective payments retroactive to the date the incorrect action was taken." 45 CFR § 205.10(a)(18) (1973-1984). See also 45 CFR § 233.20(a)(13) (1984), ("Underpayment means a financial assistance payment received by or for an assistance unit for the payment month which is less than the amount for which the assistance unit *was eligible*, or failure by the State to issue a financial assistance payment for the payment month to an eligible assistance unit if such payment *should have been issued*.") (emphasis supplied). Consequently, any retroactive benefits ordered by the state must be calculated by applying the valid rules in effect at the time benefits were lost to the claimant's circumstances as they existed at that time.

Michigan's administrative hearing regulations track the federal requirements closely. Michigan Administrative Code Rule (MACR) 400.918 provides:

> When a hearing decision is favorable to the claimant, or when the department decides in favor of the claimant prior to a hearing, the department shall make

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[10] Of course other remedies may be available, including suit in state court. In Michigan this would be possible in the Court of Claims or in the Circuit Court. See Mich. Comp. Laws § 400.37 and § 600.6401-6475.

> corrective retroactive payments promptly in accord with federal regulations.

J.A. at 155. See also MACR 400.903(1), J.A. at 153, and Mich. Comp. Laws § 400.9. Michigan case law is in accord. In *Tompkins* v. *Dempsey*, 97 Mich App 218, 293 NW 2d 771 (1980), the Michigan Court of Appeals held that the law applicable at the time the AFDC claimant lost benefits applies, and not new law. The court remanded the case to the state administrative law judge "to determine the amount of benefits to which plaintiff would have been entitled under the prior, less restrictive regulation." 293 NW 2d at 774.[11]

An order for notice relief advises class members who have lost benefits because of illegal state regulations of the availability of the state administrative hearing mechanism to remedy that loss. When coupled with the substantive federal question determination necessary for entry of the injunctive order for notice relief, notice relief provides the opportunity for class members to present their claims without the handicap of the illegal state practice or regulation which caused their loss of benefits originally. Barring grounds for denial of the claim not adjudicated by the federal court, class members who wish to pursue a state

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[11] When a federal statutory change "federalizes" a state restriction on eligibility, the change does not generally retroactively ratify past state actions that denied eligibility. In *Lascaris* v. *Shirley*, 420 US 730 (1975) (*per curiam*), an AFDC case before *Quern*, the plaintiffs claimed that New York's support cooperation requirements violated the Social Security Act. *Id.* at 731. By the time the Supreme Court noted probable jurisdiction, Congress had changed the Act to authorize cooperation requirements similar to those in New York. The Court noted the change in law, but affirmed the determination of the lower court that the policy violated the Act before it was amended by Congress. *Id.* See also *Beltran* v. *Myers*, 451 US 625, 629 (1981) (Stevens, J., concurring).

remedy should eventually receive an appropriate corrective payment as provided for by *state* law.[12]

Whether or not the petitioners here will be able to recover their benefits under state administrative procedures is yet unknown. However, as this Court said in response to factual problems of recovery raised by Illinois officials in *Quern*, "These facts may influence a plaintiff class member in deciding whether to pursue existing state administrative remedies . . ., but they do not affect our conclusion that the notice relief awarded here is permissible under the Eleventh Amendment." 440 US at 348 n.20. The petitioners below requested exactly the same relief that was sought and granted in the *Jordan* litigation. Given this Court's clear holding, the Sixth Circuit's decision that notice relief violates the Eleventh Amendment cannot stand, and it should therefore be reversed.

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[12] In *Quern* v. *Jordan*, *supra*, Illinois officials maintained that notice relief was impermissible because (1) there was little likelihood that the federal government would reimburse the state for assistance payments made relating to a defunct program, and (2) Illinois law in any event barred payment because the state treasury was prohibited from making payments out of funds appropriated for a current fiscal year for an outstanding obligation incurred in a prior fiscal year. 440 US at 348 n.20. Both these problems were surmounted by the *Jordan* class members. Following remand of the case after the *Quern* decision, notices were sent out to class members. The parties received a final administrative hearing decision disclosing the amount of benefits Illinois officials had calculated were lost, but denying their claims on the ground that Illinois law would not allow payment for the second reason stated above. See *Jordan* v. *Quern*, No. 71 C 70, Stipulation (ND Ill. Sept. 27, 1979) (lodged with the Clerk of the Court). Having thus exhausted their administrative remedies, the claimants filed suit in the Illinois Court of Claims, where they recovered a judgment for the amounts they sought. See *Peltz* v. *State of Illinois*, No. 81-CC-1475 opinion, Illinois Court of Claims May 6, 1981 and *Richardson* v. *State of Illinois*, No. 81-CC-2108, opinion (Illinois Court of Claims June 15, 1981) (lodged with Clerk of the Court).

B. The Same Eleventh Amendment Considerations Which Led This Court To Permit Notice Relief In The *Jordan* Litigation Should Lead It To Approve Such Relief In The Present Case Where There Is No Ongoing Violation Of Federal Law.

1. A suit against a state officer who is violating federal law is not a suit against a state unless the relief sought has monetary impact on the state treasury.

In *Ex Parte Young*, 209 US 123 (1908), this Court established the rule that an injunctive suit against a state officer alleged to be acting contrary to federal law "is not one against the State." *Pennhurst State School* v. *Halderman*, ___ US ___, 79 L.Ed.2d 67, 79 (1984) (hereafter *Pennhurst II*); *Young*, *supra*, at 160. In such cases, relief is justified, "notwithstanding the obvious impact on the state itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character.'" *Pennhurst II*, 79 L.Ed.2d at 81, quoting *Young*, *supra*, at 160. When federal rights are violated, the doctrine of *Young* is deemed "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" *Pennhurst II*, 79 L.Ed.2d at 81, quoting *Young*, *id.*

Despite *Young*, however, this Court has held that "some forms of injunctive relief against state officials for violations of federal law" will be barred. *Pennhurst II*, 79 L.Ed.2d at 80. The relevant exception to *Young* involved in welfare cases is the bar against "awards of retroactive monetary relief." *Id.* This exception is based upon the case of *Ford Motor Co.* v. *Department of Treasury*, 323 US 459, 464 (1945), in which this Court stated

> [W]hen the action is in essence one for recovery of money from the state, the state is a real substantial

> party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

In *Edelman* v. *Jordan*, 415 US 651 (1974), this Court made it clear that the *Ford Motor Company* exception applies not only to suits for money judgments denominated as such, but also to suits for "equitable restitution" since such relief is "in practical effect indistinguishable . . . from an award of damages against the state." *Id.* at 668. See also *id.* at 666. Thus, the Court held in *Edelman* that the order to pay retroactive welfare benefits to class members in that case violated the Eleventh Amendment. Since the plaintiffs in the present case have never sought any form of monetary relief or retroactive award from the federal court, Michigan's sovereign immunity is not implicated and the suit is not one against the state.[13]

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[13] Though the opinion in *Ford Motor Company* does not refer to history, the money judgment exception to the rule of *Ex Parte Young* is consistent with the concerns of the framers of the Eleventh Amendment. It was just such a suit against the state for a money judgment that was involved in *Chisholm* v. *Georgia*, 2 US 363, 2 Dall. 419 (1793), the case which led to the adoption of that amendment. The commentators generally agree that the fear of suits against states to enforce state debts was the prominent factor in the overwhelming vote in favor of its adoption. See, e.g., Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L.Rev. 1413, 1437-41 (1975) (concluding that Federalists supported the Eleventh Amendment to gain political support by protecting states against suits by Tory and British creditors); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L.Rev. 682, 683 (1976) (states' fears of suits regarding revolutionary war debts were prominent force behind passage of Eleventh Amendment); Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L.Rev. 1, 7, 9, 16 (1967) (same).

2. *Quern* v. *Jordan* established that an order for notice relief has no cognizable impact on the state treasury.

Whatever else is required to invoke the *Ford Motor Company* exception, a threshold requirement is that the relief in question have monetary impact, *i.e.*, that it compel the state to pay money. In *Quern* v. *Jordan*, this Court determined that notice relief was a permissible form of injunctive relief precisely because it did not have the prohibited fiscal impact on the state treasury. In *Quern*, state officials argued that notice relief, like the retroactive award struck down in *Edelman*, "will inexorably lead to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award." *Id.* at 347. This argument was rejected by the Court, which held that "notice relief does not constitute a money judgment," *id.* at 348 n.20, because it does not compel the state to pay any money:

> [T]he chain of causation [between the notice relief and any eventual award of benefits] is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. . . . [T]he mere sending of [the] notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the state, its agencies, courts, and legislature, not with the federal court.

Id. at 347-348.

Thus, *Quern* held that notice relief on behalf of a class that has lost benefits in the past in violation of federal law is a form of injunctive relief that does not violate the Eleventh Amendment. Unlike an award of retroactive benefits, it does not itself compel the state to pay retroactive relief and thus does not cause any forbidden monetary impact on the state treasury. In Eleventh Amendment terms, although the state treasury *may* ultimately be affected *if* class members obtain awards at their state administrative hearings, or in state court, such effect is not caused by the "judicial power of the United States."[14] Any effect is, instead, the result of choices and actions of the plaintiff class members and the actions of *state* agencies and *state* courts following *state* law.

3. Whatever impact an order for notice relief arguably has on the state is justified because notice relief constitutes permissible prospective relief.

Petitioners have argued that *Quern* conclusively establishes that notice relief is permissible because it has no legally cognizable fiscal impact on the state treasury. This fact, in and of itself, is sufficient to remove notice relief from the sweep of the Eleventh Amendment. However, and without conceding the point, even if notice relief is deemed to have some eventual financial impact, *Quern* supports the alternate proposition that such an effect is permissible as part of valid prospective relief.[15]

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[14] U.S. Const., Am. XI.

[15] The only financial effect of an order for notice relief, other than possible retroactive payment awards by state administrative officials or judges, is the cost of sending the notices themselves. As in *Quern*, the state official in the present case has "ma[de] no issue of the incidental administrative expense connected with preparing and mailing the notice." 440 US at 347. Such expense would in any event, this Court observed in *Quern*, be "*de minimis*." *Id.* at 347 n.19.

The *Ford Motor Company* exception to *Young*, as explained in *Edelman*, prohibits money judgments (and their functional equivalents) against states. In *Edelman*, this Court struck down the retroactive award not simply because of its fiscal impact *vel non*, but because it shared a second quality common to all money judgments: its financial impact was immediate and was "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of state officials," thus constituting "a form of compensation" to class members. *Edelman*, 415 US at 668. The retroactive award was distinguished from the prospective injunction (which had as much if not greater fiscal impact) on the ground that the latter's financial impact was not compensatory, but was "a necessary consequence of compliance in the future with a substantive federal question determination." *Id.* at 668. Any impact on the state treasury that results from such compliance is considered a permissible "ancillary effect." *Id.* See also *infra* this brief, Part II(B).

It is petitioners' position that this justification is an alternative explanation of *Quern's* approval of notice relief, and that such justification applies equally to the notice relief sought in the case at bar. In short, it is petitioners' contention that the relief requested below—a declaratory judgment that the state regulation prior to October 1, 1981, violated federal law and an order for notice relief to all persons affected by that violation—constitutes permissible prospective relief.

In *Quern*, the Court posed the question: "Does the . . . notice contemplated by the Seventh Circuit constitute permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury'?" 440 US at 346-347. It was held that notice relief fell into the former category. *Id.*

That notice relief or notice relief coupled with declaratory relief is prospective cannot seriously be doubted. As noted above, welfare eligibility, both at the time of *Quern* and currently, is required by both state and federal law to be determined based on the law that was in effect at the time benefits were denied. See *supra* note 11 and accompanying text. Here the question of eligibility and grant levels for the period before October, 1981, if it arises at all, will arise *in the future* because class members are entitled to file state claims for retroactive benefits either in response to any notice relief ordered or on their own initiative once the present litigation is concluded. When this happens, the state will *in the future* need to determine eligibility by looking at pre-October, 1981, federal and state law. The declaration that state regulations violated federal law in the past is prospective because it determines what law will apply in the future when and if those claims are presented. Notice relief is prospective because it requires the defendant in the future to notify class members of possible state remedies that they can pursue, also in the future, to obtain a correct determination of their entitlement and a possible state award of retroactive benefits.

Reference to *Milliken* v. *Bradley*, 433 US 267 (1977), *(Milliken II)*, supports this view. That case is particularly important since the *Quern* opinion cites *Milliken II* in support of its conclusion. See 440 US at 337, 349. *Quern*, *id.* at 349, cites to the very page of the *Milliken II* opinion that discusses, develops, and applies the "prospective-compliance exception" in the context of that case. *Milliken II* involved the illegal segregation of the Detroit public schools. The lower courts had found that the State of Michigan and Detroit officials had "committed acts which have been causal factors in the segregated condition of the public schools in the City of Detroit." See *Bradley* v. *Mil-*

liken, 540 F.2d 229, 233 (6th Cir. 1976). Based upon this finding of past misconduct and other findings, "compensatory" education programs were ordered, the order further providing that the "state defendants and the Detroit Board shall . . . equally bear the burden of such . . . costs imposed by the provisions contained in this judgment and previous orders. . . ." 450 F.2d at 241. Pointing to the finding of past misconduct, the financial impact of the order, and the "compensatory" nature of the programs ordered, the state officials argued that, under *Edelman* v. *Jordan*, *supra*, the Eleventh Amendment was a bar to the relief ordered.

This Court disagreed and upheld the orders. The relief "fit[ ] squarely within the prospective-compliance exception reaffirmed by *Edelman*," 433 US at 289, because it was "designed to eliminate continuing conditions of inequality" caused by past segregative acts. *Id.* at 290.

> These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*. . . . That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.

433 US at 290 (emphasis by the Court). See also, *Hutto* v. *Finney*, 437 US 678, 691 n.17 (1978) (describing *Milliken II* as a case where "the Court has approved federal rulings requiring a State to support programs that compensate for past misdeeds.").

Following the *Milliken II* Court's elucidation of the prospective-compliance exception, the notice relief in *Quern* and that urged in the present case qualify as valid

prospective relief. Just as in *Milliken II*, the order granting notice relief "operates prospectively," as outlined above. Further, notice relief, unlike the direct retroactive award of money in *Edelman*, does not "wipe the slate clean." Notice relief only notifies recipients of their right to *pursue* a retroactive award under state procedures, and does not itself grant a retroactive award. This was noted specifically by the Court in *Quern* v. *Jordan*, 440 US at 346-347, where the Court spoke of the "numerous missing links" separating the plaintiff class members from any potential awards of retroactive benefits. See *supra* this brief at Part I(B)(2).

There is also a significant parallel between the compensatory education order in *Milliken II* and notice relief in welfare cases in terms of the federal duty to correct the lingering effects of past misconduct. In *Milliken II*, the ongoing federal duty of school officials was the duty "to take the necessary steps 'to eliminate from public schools all vestiges of state-imposed segregation'." *Milliken II*, 433 US at 289-90, quoting *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 US 1, 15 (1971). In the notice relief situation, federal and state welfare law explicitly impose a similar duty "to take steps to eliminate all vestiges" of past state illegality. Federal regulations require state officials to provide notice of the recipient's right to a hearing "at the time of any action affecting his claim," 45 CFR § 205.10(a)(3), and to "promptly make corrective payments retroactive to the date the incorrect action was taken" when recipients prevail on their administrative claims, 45 CFR § 205.10(a)(18) (1984). See also MACR 400.903(l) and 400.918 (quoted *supra* this brief, Part I). In addition, Congress has required, since 1981—in language that is remarkably similar to that used in *Milliken II* and *Swann*—"that the state agency will promptly take all necessary steps to correct any . . . underpayment

of aid under the state plan." 42 USC § 602(a)(22). This requirement applies to all underpayments that are *identified* after September 30, 1981. 45 CFR § 233.20(a)(13)(iii) (1984).

Just as the plaintiffs in *Milliken II* were entitled to prospective relief calculated, albeit imperfectly, to remove the lingering effects of past illegal actions by state officials, so the petitioners here and the plaintiffs in *Quern* were entitled to similarly imperfect prospective relief to remove the continuing effects of the state welfare officials' past illegal regulations.[16]

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[16] In addition to explaining the prospective compliance doctrine of *Edelman*, *Milliken II* makes clear how the Eleventh Amendment does not bar *findings* of past misconduct, but only retroactive *relief* which is entered solely to compensate for that past misconduct and which has an impact on the state sufficient to pierce the fiction of *Ex Parte Young*. That a finding of past misconduct is essential for notice relief is clear from the elementary notion that a federal court may not enter *any* final relief on behalf of a party unless it first determines that that party has prevailed on the merits of his or her claim. *Milliken* v. *Bradley*,418 US 717, 738 (1974) (*Milliken I*) (remedies ordered by a federal court may not exceed the scope of the violation of federal law found); *Fair Assessment in Real Estate Association* v. *McNary*, 454 US 100, 113 (1981) (the determination that final relief of any kind should be ordered means that "[i]n effect, the . . . court must first enter a declaratory judgment" on the merits in favor of the party for whose benefit the relief is ordered). That it is *relief* that is the focus of the Eleventh Amendment bar rather than the simple adjudication of past misconduct is clear from the numerous cases that allow damages to be awarded against state officials personally when they violate federal rights. See *Scheuer* v. *Rhodes*, 416 US 232, 237-238 (1974) (claim for award of damages against state officials personally is not barred by the Eleventh Amendment). In such cases, a finding of past misconduct is necessarily involved. However, the action is not barred by the Eleventh Amendment because the relief, although purely compensatory in nature, has no effect on the state itself.

C. Four Circuit Courts Of Appeal Have Approved Orders For Notice Relief To Remedy Past Violations Of Federal Law Despite The Absence Of Any Injunctive Relief Against Future Violations.

The Courts of Appeal for the Fourth, Fifth, Ninth, and Eleventh Circuits have all approved, on authority of *Quern*, adjudications of past violations of federal law and notice relief to class members affected by those violations despite the absence of any current conflict between federal and state law. See *Randall* v. *Lukhard*, 729 F.2d 966 (4th Cir. 1984) *(en banc)*, *cert. denied*, ___ US ___, 105 S.Ct. 222 (1984); *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir. 1980), *cert. denied sub. nom. Johnston* v. *Silva*, 449 US 1125 (1981); and *Beltran* v. *Myers*, 701 F.2d 91 (9th Cir. 1983), *cert. denied sub. nom. Rank* v. *Beltran*, ___ US ___, 103 S.Ct. 3115 (1983); *Appleyard* v. *Wallace*, 754 F.2d 955 (11th Cir. 1985).[17]

In *Appleyard* v. *Wallace*, *supra*, the Eleventh Circuit considered a case where plaintiffs, suing under 42 USC § 1983, challenged an Alabama Medicaid level-of-care regulation which had barred their admission to nursing homes and appropriate Medicaid eligibility, as violative of the federal Social Security Act and the United States Constitution. While the case was pending, Alabama revised its regulation making it consistent with federal law. Plaintiffs therefore sought no relief with regard to the new regulation, but continued to press their claims for notice relief on behalf of the class that had lost benefits under the old regulation during the period that it was in force (April, 1982, to September, 1983).

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[17] The Second Circuit has not allowed notice relief under the given circumstances but for reasons different from those given below by the Sixth Circuit. See *Colbeth* v. *Wilson*, 707 F.2d 57 (2nd Cir. 1983), affirming 554 F.Supp 539 (D.Vt. 1982).

The Eleventh Circuit reversed the district court's dismissal of plaintiffs' complaint, holding that claims for notice relief for a past period of Medicaid eligibiliy were neither moot nor barred by the Eleventh Amendment, on authority of *Quern* v. *Jordan*, 440 US 332 (1979). The *Appleyard* court specifically rejected the argument that "some actual injunctive, declarative, or other prospective relief, aside from notice relief itself, together with a concomitant determination that the defendants acted illegally, must precede an award of notice relief." See also *infra* this brief, Part II(B). Instead, consistent with the petitioners' views herein and contrary to those of the Sixth Circuit below, the Eleventh Circuit concluded:

> We cannot see any basis upon which to distinguish *Quern* notice from other forms of equitable relief permissible under the Eleventh Amendment. That a claim for injunctive relief becomes moot should not, therefore, moot a separate claim for *Quern* notice. . . . [N]otice relief is not barred by the Eleventh Amendment since the cost of that notice is more properly characterized as ancillary.

754 F.2d at 962-963.

In *Beltran* v. *Myers*, *supra*, California Medicaid applicants challenged, as violative of the Social Security Act, California's transfer-of-assets law under which they would be rendered ineligible if they had transferred property within a certain period of time before their application. The district court and the Ninth Circuit Court of Appeals held the law to be consistent with federal law in effect at that time. See *Dawson* v. *Myers*, 622 F.2d 1304 (9th Cir. 1980). This Court granted certiorari, *Beltran* v. *Myers*, 451 US 625 (1981). While the case was pending in this Court, federal law changed in such a way that it appeared that "in the future the states will be permitted to impose transfer of assets restrictions generally similar to that of

California." *Id.* at 627. Consequently, this Court vacated and remanded the Court of Appeals' decision for reconsideration in light of the federal statutory change. *Id.* at 628-629. Though the *per curiam* opinion of this Court was silent on the issue, four members of the Court, in a separate concurrence, said:

> On remand, the Court of Appeals should, of course, consider the impact of the statutory change on class members' future rights, but it also should determine what relief is appropriate to remedy the past violations. Cf. *Quern* v. *Jordan*, 440 US 332.

Id. at 629.

Following the suggestion in the concurring opinion, the district court in *Beltran* reversed itself on the merits, held that California's transfer-of-assets law violated pre-change federal law, and ordered notice relief on behalf of all applicants who had lost benefits before the federal law change. *Beltran* v. *Myers*, No. 78-2350 CBM(Mx), [1982 Transfer Binder] CCH Medicare and Medicaid Guide ¶ 31,835 (C.D. Cal., Feb. 4, 1982) (lodged with Clerk of the Court). The Ninth Circuit affirmed, *Beltran* v. *Myers*, 701 F.2d 91 (9th Cir. 1983); *cert. denied sub nom. Rank* v. *Beltran*, ___ US ___, 103 S.Ct. 3155 (1983).

In *Randall* v. *Lukhard*, *supra*, The Fourth Circuit considered claims of Medicaid applicants in Virginia who challenged a transfer-of-assets law similar to California's on grounds of its conflict with the same provisions of federal law involved in *Beltran*. Before summary judgment could be sought in the district court, the same federal law change as that involved in *Beltran* ensued. The *en banc* Fourth Circuit held that Virginia's transfer-of-assets rule did not violate *post*-change federal law. However, the Court of Appeals affirmed that portion of the district court's decision that granted declaratory and

notice relief on behalf of applicants who applied for Medicaid before the new federal law went into effect. Certiorari was denied by this Court. ___ US ___, 105 S.Ct. 222 (1984). See also *Simpson* v. *Miller*, 93 F.R.D. 450 (N.D. Ill. 1982) (district court held Illinois child care policy in violation of old federal law and ordered notice relief.)

In *Silva* v. *Vowell*, *supra*, plaintiffs challenged two aspects of Texas' AFDC-IP (Incapacitated Parent) program: a "capable of light work requirement" and a 60-day disability standard. Before judgment could be rendered on the "light work" requirement, it was changed by the defendants to conform to federal law. 621 F.2d at 643, 650. The district court nonetheless ordered notice relief. *Id.* On appeal, the Court of Appeals vacated that portion of the judgment relating to the 60-day disability standard since plaintiffs belonged to the subclass raising the "light work" issue. Consequently, the court remanded the case for intervention by a proper plaintiff affected by the 60-day standard. *Id.* at 649-650. However, the Fifth Circuit held, over an Eleventh Amendment objection, that the "light work" plaintiffs "are still entitled to have an appropriate notice sent to all class members who have been denied benefits because they were capable of light work . . ." *Id.* at 651. Rejecting arguments that notice relief would violate the Eleventh Amendment, the court held that the "notice to this class is well within the prospective-compliance exception referred to in *Milliken*." *Id.* at 653.

II. THE SIXTH CIRCUIT HELD THAT NOTICE RELIEF WAS BARRED FOR TWO REASONS, NEITHER OF WHICH CAN WITHSTAND SCRUTINY.

Despite this Court's holding in *Quern* that an order for notice relief does not violate the Eleventh Amendment, the Sixth Circuit below held that notice relief was barred

in the present case. *Banas* v. *Dempsey*, 742 F.2d 277 (6th Cir. 1984). J.A. at 156. There were two bases for that holding. First, while conceding that an order for notice relief would constitute prospective relief, the Sixth Circuit held that *Cory* v. *White*, 451 US 85 (1981), stands for the proposition that even prospective injunctive relief against state officers is barred by the Eleventh Amendment. *Id.* at 287, 288; J.A. at 175-177. Second, the Sixth Circuit read *Quern* as requiring that, as a prerequisite for any order for notice relief addressed to past violations of federal law, there must be an ongoing injunction against present and future violations. *Id.* Petitioners believe that both these grounds are in error.

A. The Sixth Circuit's Reliance On *Cory* v. *White* Is Misplaced

Petitioners contend that the Sixth Circuit completely misread *Cory* v. *White*, 451 US 85 (1981). *Cory*, of course, correctly held that the Eleventh Amendment "does not bar a suit to enjoin the State itself simply because no money judgment is sought." Id. But *Cory* was an interpleader action based upon diversity of citizenship, and no violation of federal law was ever alleged by the plaintiffs. *Id.* Consequently, *any* judgment rendered in *Cory* would have been a judgment against the "State itself." This is in stark contrast to *Young*, *Edelman*, *Quern* and the present case, all of which involve just such allegations of violation of federal law by defendant state officials. Since a suit against state officials for violation of federal law "is not one against the state," *Pennhurst State School and Hospital* v. *Halderman*, ___ *US* ___ *79 L.Ed.2d 67, 79 (1984)*, *Cory* is simply inapposite.

The *Cory* Court itself pointed out this distinction when it indicated that the plaintiff in *Cory* could not take advan-

tage of the *Edelman* prospective relief exception to the the Eleventh Amendment because *Cory* was a "suit naming a state officer as defendant, but not alleging a violation of . . . federal law." *Id.* at 91. Thus, the *Cory* Court merely reaffirmed the rule that the Eleventh Amendment bars even injunctive suits against state officers *"unless they are alleged to be acting contrary to federal law . . ."* *Id.* (emphasis supplied). Of course, if the Sixth Circuit's reading of *Cory* v. *White* were correct, *Ex Parte Young* would have been overruled.

B. The Language From *Quern* Relied Upon By The Sixth Circuit Affords No Basis For Holding That Notice Relief Is Barred In The Present Case

The Sixth Circuit's second reason why notice relief is barred in the present case is based upon a statement by this Court in *Quern* that:

> The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the [district] court. See *Milliken* v. *Bradley*, 433 US at 290.

Quern, 440 US at 349. See *Banas* v. *Dempsey*, 742 F.2d at 286; J.A. at 173. This statement, in the view of the Sixth Circuit, was an indication that, "[t]o escape the bar of the Eleventh Amendment, an order [for notice relief] against state officials must be both 'prospective' *and* ancillary to" an injunction restraining ongoing violations of federal law. *Id.* at 288 (emphasis in original). The Sixth Circuit took the reference to "prospective relief already ordered by the [district] court" in *Jordan* to be a reference to the original permanent injunction against ongoing violations of federal law (entered in 1972). Since in the present case federal law changed before a permanent injunction could be entered, the Sixth Circuit reasoned, the basis for an

order for notice relief "ancillary" to such an injunction did not exist. *Banas* at 288, J.A. at 176. According to the opinion below, without a viable claim that defendant violated federal law *after* that law changed, there could be no basis for an order for notice relief to redress any violation *before* federal law changed. *Id.*

1. The Sixth Circuit's interpretation of the sentence in question is inconsistent both with the remainder of the *Quern* Opinion and with the very sentence being construed.

The Sixth Circuit's interpretation of the sentence quoted from *Quern* is wrong for three reasons. First, the Sixth Circuit's reading is completely contradictory to the remainder of the *Quern* opinion. The only bar to entry of an order for notice relief in the *Jordan* litigation (and in the present case) was the Eleventh Amendment. In other parts of the *Quern* opinion, as discussed *supra* this brief Parts I(B)(2) and I(B)(3), this Court held that an order for notice relief "does not constitute a money judgment" against the state, 440 US at 348 n.20, and "constitutes permissible prospective relief," *id.* at 346-347, and thus does not violate the Eleventh Amendment. If in fact notice relief is not barred by the Eleventh Amendment, then there is no reason to justify its entry as an exercise of the federal court's ancillary powers.[18]

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[18] Under the ancillary jurisdiction doctrine, a district court "may, as an incident to disposition of a matter properly before it, decide other matters raised by the case *of which it could not take cognizance were they independently raised.*" See *Wright*, Law of Federal Courts, § 9 at p. 28 (1983) (emphasis supplied). The problem with reading the *Quern* statement as referring to ancillary jurisdiction is that the Court in *Quern*, in the paragraph immediately preceding the statement in question, had already carefully explained how the district court *had* jurisdiction, despite the Eleventh Amendment, over the "matter" of notice relief. *Quern* v. *Jordan*, 440 US at 348.

The second problem with the Sixth Circuit's interpretation is that, whatever meaning of the term "ancillary" the Sixth Circuit had in mind, it distorts the facts to say that notice relief was in any sense ancillary to the permanent injunction entered in the *Jordan* litigation. In the original *Jordan* lawsuit, the district court entered a preliminary injunction in April, 1971, and declaratory relief and permanent injunctive relief in March, 1972. Thus, all class members who applied for AABD after April, 1971, had their applications processed in accord with federal regulations. Because these class members were protected by the injunction, they lost no benefits, and had no need for notice relief.

The only class members who lost benefits and who therefore could pursue state remedies in response to notice relief were those AABD applicants who applied for benefits between July 1, 1968, and the date of the preliminary injunction. See *Jordan* v. *Trainor*, 405 F.Supp 802, 803 (N.D. Ill. 1975). Where the only class members who sought notice relief, and who would benefit from it, were those *excluded* from the terms of the permanent injunction, it makes no sense to say that the notice relief entered on *their* behalf was "ancillary" to the permanent injunction. Any logical connection is stretched even further when one realizes that, at the time that notice relief was requested and granted in 1975, the entire AABD program had already been defunct for over a year, and by the time this Court approved notice relief in 1979, the district court's injunction had been moot for five years. See *Quern* v. *Jordan*, 440 US at 348, n.20. Thus, in the *Jordan* litigation, as in the present case, there simply *was* no permanent injunction that covered (or determined the rights of) the class members seeking notice relief.

The third problem with the Sixth Circuit's interpretation is that it misreads the introductory phrase of the very

sentence being construed. That phrase limits the sentence's significance to a perceived difference between "[t]he notice approved by the Court of Appeals" and the "notice . . . ordered by the District Court." The only dispute between the *en banc* Seventh Circuit and the district court in *Quern* was over the *content* of the notice itself—not about the propriety of entering an order for *some* form of notice relief. See *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977) (*en banc*). The Sixth Circuit, however, by interpreting the sentence to require an injunction against future violations as "the foundation . . . to support a notice *order*," *Banas*, 742 F.2d at 287, J.A. at 174 (emphasis supplied), viewed the passage as questioning whether *either* court below in *Quern* had the power to order *any* form of notice relief. If this were the true meaning then the sentence would not make sense—clearly the district court's *order* for notice relief was no more or less "ancillary" to other relief than was the Court of Appeal's *order*. Indeed, there was no dispute between the two courts or between those courts and this Court in *Quern* on the power to enter *some form* of notice relief. The only dispute was over the content of the notice to be sent.

The Sixth Circuit's error becomes apparent when the text of the quoted sentence is looked at more carefully. The subject of the quoted sentence is not "the district court's order" or "the Court of Appeals' order," but rather the subject is "*the notice*" itself. When the correct subject is inserted, so that this Court's comparison is limited to the content of the respective notices, and not to the *orders* for relief, then the meaning of the term "ancillary" becomes clear, as will be shown below.

2. The term "ancillary," as used in *Quern*, refers to the fiscal impact of relief.

The only possible meaning of the term "ancillary" as used in the sentence in question is the special sense that it

has in Eleventh Amendment jurisprudence: to describe the permissible "effect on the state treasury" of compliance with prospective relief. *Edelman*, 415 US at 668. As applied in *Edelman* and *Milliken II*, the financial impact of relief that is "a necessary consequence of compliance in the future with a substantive federal question determination," is "ancillary" to that determination. *Edelman*, *id.*; *Milliken II*, 433 US at 289. See also *Hutto* v. *Finney*, 457 US 678, 691 n.17 (1978) (justifying the fiscal impact of an attorney fee award and stating that the "cost of compliance is 'ancillary' to" prospective relief); *id.* at 690 n.15 (describing the "'[a]ncillary' cost" of compliance with the prospective order for compensatory education programs in *Milliken II*).[19]

There is ample evidence that this was the intended meaning of "ancillary" in *Quern*. The *Quern* opinion cites—for the very proposition stated in the sentence in question—the Eleventh Amendment discussion in *Milliken II* concerning the cost of "prospective compliance" with the remedial desegregation orders. See *Quern*, 440 US at 349 (quoted *supra* this brief at 32). In the only other place in the *Quern* opinion that the term "ancillary" appears, it is used in precisely this sense. See *id.* at 337 (citing *Ex Parte Young* for the proposition that "[a] federal court . . . may enjoin state officials . . . even though such an injunction has an ancillary effect on the state treasury.") Further, as discussed below more completely, reading the term as a reference to the differing *effect* of the notice issued by the district court and the

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[19] Ancillary, then, as used in the Eleventh Amendment sense, simply describes the effect of permissible prospective relief. While in *Jordan* notice relief in fact supplemented (moot) nondeclaratory relief previously granted to a sub-class of plaintiffs, the Sixth Circuit has taken what happened to be true in that case and elevated it to a constitutional requirement.

modified notice issued by the Court of Appeals fully accounts for the introductory phrase, since it was precisely a difference in financial impact that distinguished the two notice forms.

When the Eleventh Amendment meaning of ancillary is inserted, the sentence becomes intelligible and consistent with the remainder of the *Quern* opinion. The first effect of applying the Eleventh Amendment meaning is that it makes clear what "prospective relief already ordered" that the impact (of the Court of Appeals' notice, but not that of the district court) was "ancillary to." As discussed above, *Edelman* and *Milliken II* indicate that ancillary costs are those that are a "necessary consequence of compliance in the future with a *substantive federal question determination.*" *Edelman*, 415 US at 668; *Milliken II*, 433 US at 289 (emphasis supplied). Using the Eleventh Amendment sense of the term "ancillary," it is clear that the only substantive federal question determination to which the impact of notice could be ancillary was the original declaratory judgment holding that Illinois officials had violated federal law from 1968 to 1972—a finding left undisturbed by any of the appellate courts throughout the course of the litigation. The burden of dealing with state administrative claims for lost benefits and possibly paying those claims, if required by state law, *is* "a necessary consequence of compliance in the future with [the] substantive federal question determination" that the state regulations violated federal law during that period. Since the only substantive federal question determination that applied to the class getting notice was the 1972 declaratory judgment, this Court's reference to "prospective relief already ordered" in the quoted sentence must be to that declaratory relief.[20]

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[20] For the proposition that such a declaration of past misconduct constitutes prospective relief, see *supra* this brief Part I(B)(3).

The point is made more emphatically by examining the Sixth Circuit's conclusion that the "prospective relief already ordered" by the *Jordan* district court referred to the permanent injunction. The only substantive federal question determinations necessarily implicated by the permanent injunction entered in *Jordan* were that Illinois law violated federal law from March 15, 1972 (the date of judgment) *forward* and that state officials were required to process all AABD applications received *after that date* in accord with federal law. See *Jordan* v. *Weaver*, No. 70 C 71, Judgment, (ND Ill. March 15, 1972), Appendix to this brief at 4a. The "necessary consequence[s] of compliance in the future with," and therefore the ancillary effect of, these determinations were simply the ones that are spelled out in the injunction—earlier processing and payment of "new" AABD applications filed by *future* applicants. It makes little sense to say that a "necessary consequence of compliance with" *these* determinations would have included required notification of a completely different group of *past* applicants and the processing of any administrative claims filed by them in response to notices.[21]

Describing the effect of notice relief as ancillary to the permanent injunction against future violations makes even less sense when one remembers that, one year before the district court ordered notice relief and four

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[21] In addition, it is doubtful that determinations limited to a finding of a violation of federal law *after* the date of judgment could serve as a basis for an order for notice relief to class members who lost benefits *before* the date of judgment. Though the equitable powers of the federal court are indeed broad, see *Swann* v. *Charlotte Mecklinberg Board of Education*, 402 US 1, 15 (1971), relief ordered by the federal court may not exceed the scope of the violation of federal law found by that court. See n. 16, *supra*.

years before this Court's opinion in *Quern*, the AABD program was abolished, thereby completely nullifying the injunction's prospective effect. After the abolition of the AABD program, there could no longer be *any* "necessary consequence[s] of compliance in the future with" the permanent injunction, let alone the particular ancillary effects of notice relief of concern to the Court in *Quern*.

The second result of applying the Eleventh Amendment meaning of "ancillary" to the sentence in question is that it demonstrates clearly how the effect of the district court notice was *not* ancillary to the relevant declaration of illegality, while the effect of the Court of Appeals notice *was*. If nothing else is clear from *Quern*, it is that to avoid the Eleventh Amendment bar, ultimate liability for retroactive benefits must be left to *state* agencies and courts following *state* law. See *Quern*, 440 U.S. at 347-348, quoted in relevant part *supra* this brief in Part II(B)(2). Not coincidentally, it was precisely this issue that led to the conflict between the *Jordan* district court and the *en banc* Seventh Circuit regarding the content of the notice. The district court notice stated in relevant part that "you were denied public assistance to which you were entitled in the amount of $____" and the notice of appeal returnable by the class member stated that "[t]he department . . . denied me benefits to which I was and am entitled." See *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977) *(en banc)*.The wording of these forms, according to the Seventh Circuit, "compelled" an "admission" of state liability for lost benefits in a particular amount. *Id.* Such a "federal predetermination of state liability" constituted "a type of money judgment against the state." *Id.* After removal of this objectionable content from the forms, the Court of Appeals' version only required that the state *consider* claims for retroactive benefits, thus allowing the state to

make its own determinations of liability for the lost benefits. See *id.* at 876.

The effect of the district court notice—imposed liability for retroactive benefits in a particular amount—was not a "necessary consequence of compliance in the future" with the declaration of illegality, because strict compliance with that declaration could be had without a determination of ultimate liability.[22] In other words, the district court notice compelled "consequences" beyond those that could reasonably be considered "ancillary" to the declaratory relief entered earlier. The Court of Appeals' notice, on the other hand, only required that the state *consider* claims of class members for retroactive benefits under established state procedures. The burden of holding hearings and making adjudications was properly viewed as ancillary to the declaratory judgment because "a necessary consequence" for state officials who fail to pay benefits required to be paid by federal law, is that they will be faced with administrative claims for retroactive benefits.[23]

Understood in the above light, the *Quern* sentence in question supports rather than defeats the relief sought by petitioners below. The relief requested was precisely the same modified notice approved by the *en banc* Court of Appeals and by this Court in *Quern*. The effect of sending the requested notice—a requirement that the state determine its own liability on any claims class members choose

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[22] The two defenses to liability proffered by state officials in *Quern* were both bases for denial of liability that would not have transgressed the declaratory judgment. See *Quern*, 440 US at 348 n.20. See also *supra* this brief at n.12.

[23] See Part I(B)(3), *supra*, discussing the duty of state welfare officials when underpayments of aid are identified.

to file in response to the notice—would be ancillary to the declaratory judgment, also requested below, that respondent's regulations violated federal law before October 1, 1981. This determination of past illegality would have prospective or future effect because both Michigan and federal law require that future claims for lost benefits be adjudicated in accord with valid eligibility regulations in effect at the time that the losses were incurred. See *supra* this brief, n.11 and accompanying text.

Of the four other Circuit Courts of Appeal that have allowed notice relief in the same circumstances as the present case (see cases and discussion *supra* this brief Part I(C), two have had occasion to discuss the meaning of the sentence in question from *Quern*.

In *Appleyard* v. *Wallace*, 754 F.2d 955 (11th Cir. 1984), the Court of Appeals rejected the argument that "the word 'ancillary' in *Quern* goes beyond its meaning in *Edelman*, in which the Court referred to the costs to the state treasuries of complying with prospective orders as a permissible 'ancillary effect'." *Id.* at 691. The court then rejected the conclusion "that some actual injunctive, declarative, or other prospective relief, aside from the notice itself, together with a concomitant determination that the defendants acted illegally, precede an award of notice relief," *id.* at 962, and ordered notice relief.

Similarly, the Fifth Circuit in *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir. 1980) *cert. denied* 449 US 1125 (1981), was faced with the argument that the cost to the state of actually preparing and sending the notices rendered the order for notice relief violative of the Eleventh Amendment. The court rejected the contention. It read the term "ancillary" as used in *Quern* to refer to the costs of complying with the notice relief order, including the direct

costs of actually preparing and sending the notice. *Id.* at 652-653.

In summary, because the notices in the case at bar will have no direct fiscal effect on Michigan's treasury, and because any fiscal effect will be a necessary consequence of future compliance with the federal question determination inherent in notice relief (the declaratory judgment), notice relief here is no more barred by the Eleventh Amendment than it was in *Quern*. The Sixth Circuit erred by holding that an order for notice relief is barred by the Eleventh Amendment unless it is "ancillary" to a permanent injunction, and the decision of the Court of Appeals should therefore be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case should be remanded with the directions that declaratory and notice relief are not barred by the Eleventh Amendment, and may be entered if petitioners prevail on the merits of their motion for summary judgment.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 71 C 70

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similary situated,
Plaintiffs,

vs.

HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities,
Defendants.

MEMORANDUM OPINION AND ORDER

This civil rights action challenges the administration of federally funded Aid to the Aged, Blind and Disabled program (AAPD) by the defendants. Currently, the plaintiff has moved for summary judgment seeking a permanent injunction, declaratory judgment, and punitive damages. Plaintiff argues and the court agrees that there exists no genuine issue of material fact.

Section 1382(a)(8) of Title 42 provides that assistance under the AABD plan shall be made to eligible applicants with reasonable promptness. Federal regulations stipulate that reasonable promptness shall not exceed 30 days for aid to the aged and blind and 60 days for the disabled. These time limitations are mandatory. *Rodriquez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) (Kiley, Will and Decker, JJ). The defendants,

as administrators of the Illinois program, have not complied with these limits, either for determining eligibility or in furnishing the first assistance check. Federal Handbook of Public Assistance Administration, Part IV, §§ 2200(b)(3)(4) and 2300(b)(3)(5). For the reasons stated by plaintiff in his memorandum, the court agrees that the plaintiff class is entitled as a matter of law to a permanent injunction to insure compliance, present and future, with the requisite time limitations.

Based on the same authority a final judgment will be entered declaring the Illinois Categorical Assistance Manual sections 4004 and 8255 (and subsections thereunder) as applied to applicants for AABD to be invalid insofar as they are inconsistent with the Social Security Act and regulations issued pursuant thereto.

Plaintiff also seeks punitive damages against defendant Swank, who was the Director of the Illinois program. The court is not inclined to grant such damages, believing the permanent injunction to be a sufficient deterrent to future violations.

Finally, a final judgment and permanent injunction is sought requiring defendants to pay to those applicants for AABD since July 1, 1968, who met the eligibility requirements for AABD at the time of their applications, AABD benefits from the date of their application. Based on the *Rodriquez* case and other authority cited by plaintiff, the class is entitled to such payments at least from the last day of the requisite time limitations contained within the federal regulations. The class consists of those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30 day or 45 day (60 days for aid to the disabled as of January 1, 1971) limits. *Lewis* v. *Riggins*, ____ F. Supp. ____ (Cause No. 71 H 19, N.D. Ind. May 19, 1971).

Plaintiff, however, seeks the retroactive payments from the date of application rather than the last day of the time limitation. The court cannot agree with this position. The federal statute and regulations grant a reasonable time to the admin-

istrators to act upon the application and require payments to begin only within that period but not from the beginning of such period. This court perceives no requirement that the assistance shall be paid retroactively to the date of application. Nor is the right to the equal protection of the law violated by such an order. The processing of some applications faster than others within the time limits does not establish arbitrary classifications constituting invidious discrimination. No classifications will be processed before others. As long as all are completed and assistance checks are furnished within the time limits, a definite and objective standard exists for the processing of the applications. Therefore, the plaintiff class is entitled to retroactive benefits from the last day of the federally required time limits.

Accordingly, plaintiff's motion for summary judgment is granted in part and denied in part. Counsel for plaintiff is ordered to present to the court within 20 days a proposed judgment order and decree in accordance with this opinion.

ENTER:

/s/Alexander J. Napoli
ALEXANDER J. NAPOLI
UNITED STATES DISTRICT JUDGE

DATED: February 4, 1972

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

No. 71 C 70

JOHN JORDAN, by his next friend,
JEANETTE BRYANT, individually and
on behalf of all other persons similary situated,
Plaintiffs,

vs.

EDWARD T. WEAVER, Director,
Illinois Department of Public
Aid; HAROLD O. SWANK, former
Director, Illinois Department
of Public Aid; DAVID L. DANIEL,
Director, Cook County, Department
of Public Aid; EDWARD J.
BARRETT Comptroller of Cook
County, individually and in
their official capacities,
Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Alexander J. Napoli, United States District Court, and the issues having been duly heard and a Memorandum Opinion and Order having been duly rendered on February 4, 1972.

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The defendants DAVID L. DANIEL, Director, Cook County Department of Public Aid, and EDWARD J. BARRETT, Comptroller of Cook County, and EDWARD T. WEAVER, Director, Illinois Department of Public Aid, their agents, including all of the County Departments of Public Aid in the State of Illinois, their employees, and all persons in active concert and participation with them, are hereby permanently enjoined from failing to make determinations of eli-

gibility and mailing either the first full AABD assistance check or notification of denial of assistance, within thirty days from the date of application as to applicants for aid to the aged and blind under the AABD program in the State of Illinois, and within sixty days from the date of application as to applicants for aid to the disabled under the AABD program in the State of Illinois, except as provided in paragraph 3, infra.

2. The entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day from the date of application as to aged and blind applicants, and no later than the sixtieth (60th) day from the date of application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth day or sixtieth day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day, respectively, subject only to the exception in paragraph 3, infra. If the applicant is denied AABD assistance retroactive to the thirtieth (30th) or sixtieth (60th) day, respectively, pursuant to paragraph 3, infra, said applicant must receive a written statement explaining (a) the unusual circumstances, referred to in paragraph (a) the unusual circumstances, referred to in paragraph 3, upon which the denial is based, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

3. The thirty-day requirement as defined in paragraphs 1 and 2 and in 45 C.F.R. §206.10(a) (36 Fed.Reg. 3864, February 29, 1972) shall be strictly complied with except in unusual circumstances, e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician, or because of some administrative or other emergency that could not be controlled by the agency, in which instances the case record shows the cause for the delay.

4. Illinois Categorical Assistance Manual, Section 4004, and subsections thereunder, as applied to applicants for AABD are invalid insofar as they are inconsistent with the requirements of paragraphs 1 and 2, supra.

5. That the defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, his agents, including all of the County Departments of Public Aid in the State of Illinois, and employees, and all persons in active concert and participation with them, are hereby enjoined to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 and April 16, 1972 [sic] [should read "1971"], and were determined eligible, as follows:

"(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, AABD assistance for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement to AABD became effective;

"(b)(i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, AABD assistance for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

"(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, AABD assistance for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

"These AABD benefits shall be mailed to those persons currently receiving AABD within eight months with an explanatory letter, said letter having been approved by plaintiffs' attorney. Any AABD benefits received pursuant to this paragraph shall not be deemed income or resources under Article III of the Illinois Public Aid Code.

For those persons not presently receiving AABD:

(a) A certified letter (return receipt requested), said letter having been first approved by plaintiffs' attorney, shall be sent to the last known address of the person,

informing him in concise and easily understandable terms that he is entitled to a specified amount of AABD benefits wrongfully withheld, and that he may claim such amount by contacting the County Department of Public Aid at a specified address, within 5 days from the receipt of said letter.

(b) If the County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. Persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision.

6. Within 15 days from the date of this decree, defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall submit to the Court and the plaintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 45, supra, of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the defendant WEAVER will fulfill the requirements of this Decree will be resolved by the Court.

7. The defendants shall have the continuing obligation to submit to the Court and to the plaintiffs' attorney a detailed monthly report indicating the number of AABD applications disposed of by length of time from the date of application, for each county in the State of Illinois, and such other information which accurately reflects the time for processing AABD applications, until such time that such reports establish compliance with the terms of this order for six months.

8. Defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall issue a bulletin of the Illinois Department of Public Aid incorporating the essence of this judgment within 15 days from the entry thereof.

9. This judgment shall be binding upon defendants, their officers, agents, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

10. The prayer of the plaintiffs for punitive damages against the defendant HAROLD O. SWANK is hereby denied.

11. This Court shall retain continuing jurisdiction over this cause for all purposes.

ENTER:

/s/ALEXANDER J. NAPOLI
Alexander J. Napoli, Judge
United States District Court

Dated: March 15, 1972